

IN THE SUPREME COURT OF TEXAS

No. 96-0739

MARSHA LITTLEFIELD, ET AL., PETITIONERS

v.

SCOTT SCHAEFER AND TOM GRAYBAEL, RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

JUSTICE BAKER, joined by JUSTICE ENOCH, dissenting.

The Court holds that the release in this case is not “conspicuous” for the sole reason that the release’s print size is too small for a reasonable person to read. I believe the forms the decedent signed meet the conspicuousness test in the Texas Uniform Commercial Code and our caselaw. Accordingly, I respectfully dissent.

In determining whether a release is conspicuous, the Court looks to see if the release is written in such a manner that a reasonable person against whom it is to operate should have noticed the release. *See* TEX. BUS & COM. CODE § 1.201(10); *Cate v. Dover Corp.*, 790 S.W.2d 559, 560 (Tex. 1990). The comment to section 1.201(10) states that the conspicuousness definition is to establish the test of whether attention can reasonably be expected to be called to it. The purpose of the requirement is to protect the signer from surprise and an inadvertent waiver of his or her rights. *See Cate*, 790 S.W.2d at 561.

As the court of appeals noted, here the forms are on one side of one page, and the release language is in the lower left quarter of each form. The title across the top of the page is in all capitals and is underlined. The title reads: “RELEASE AND ENTRY FORM.” The release clause itself provides the only substantive writing on the entire form. The “SIGNATURE RELEASE” is located directly beside the release language. The top line of the release language is Bold-Faced, Centered, and Capitalized, and reads: “**RELEASE AND WAIVER OF LIABILITY AND**

INDEMNITY AGREEMENT.” The last line of the release language is in larger type than the rest of the release. It is also bold-faced, centered, capitalized, and underlined and reads: **“I UNDERSTAND MOTOCYCLE RACING IS DANGEROUS. YES, I HAVE READ THIS RELEASE.”**

The Court’s opinion does not set out the facts related above. Nor does it tell us that petitioner, in her brief, concedes that the release language in its entirety satisfies the express negligence requirement of *Ethyl Corp v. Daniel Const. Co.*, 725 S.W.2d 705, 708 (Tex. 1987). It appears to me that the petitioner had to be able to *read and understand* the release to be able to concede that the release clause satisfies the express negligence requirement. Furthermore, it follows that the release also meets the conspicuousness test. Again, all that the test requires for a clause to be conspicuous is that it is written so a reasonable person against whom it is to operate should have noticed it. *Cate*, 790 S.W.2d at 560.

I agree with the court of appeals’ conclusion that when one considers all the circumstances, instead of just solely the print size, the release language draws a reader’s attention. Therefore, I believe, as the court of appeals held, that the release language is conspicuous as a matter of law. I would deny the writ.

Because the Court reaches a contrary conclusion, I respectfully dissent.

James A. Baker, Justice

OPINION DELIVERED: October 30, 1997